



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 28, 1996

Mr. Rick Ybarra
Assistant Attorney General
Open Records Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR96-0262

Dear Mr. Ybarra:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38226.

The Office of the Attorney General of the State of Texas ("OAG") received two requests for information pertaining to its investigation of Columbia psychiatric hospitals. You assert that certain requested documents are excepted from required public disclosure based on sections 552.101, 552.107(1), 552.108, and 552.111 of the Government Code. You enclosed representative samples of the information you assert is excepted from public disclosure.¹

You assert that the informant's name on the documents in envelope one are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege. Section 552.101 excepts from disclosure information that is confidential by law and incorporates the informer's privilege. This office has construed the informer's privilege aspect of section 552.101 as protecting the

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

identity of a person who reports a violation or possible violation of the law to officials charged with the duty of enforcing the particular law. See Open Records Decision No. 515 (1989). The privilege does not protect an informer's identity if the subject of the information already knows the informer's identity. See Open Records Decision No. 208 (1978).

Envelope one contains three documents. It is not clear to us that the person whose identity you seek to protect on each document was reporting unethical conduct or a violation of law. If the person was reporting a violation of law, you may withhold all of the information you marked that identifies the person who submitted the document pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege.

Envelope two contains several statements of deficiencies prepared by the Texas Department of Health and Human Services. In accordance with federal regulation, you must release these provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. See 42 C.F.R. §§401.126, .133; Open Records Decision No. 487 (1988). As the reports are signed by a provider representative and the "provider's plan of correction" portion of the report appears to contain the provider's comments to the report, we believe the provider has had a reasonable opportunity to review and comment on the report. Accordingly, you must release the report, but with deletions of information that identifies the persons specified in the regulation.

Envelope three contains what appear to be Texas Department of Mental Health Mental Retardation ("TMHMR") complaint hotline logs. You raise section 34.08 of the Family Code. The Seventy-fourth Legislature repealed this provision and enacted section 262.201 of the Family Code.² Section 262.201 reads in pertinent part as follows:

a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or

²See Act of April 6, 1995, 74th Leg., R.S., ch. 20, sec. 1, 1995 Tex. Sess. Law. Law Serv. 113, 262 (Vernon); Act of May 25, 1995, 74th Leg., R.S., ch. 751, sec. 93, 1995 Tex. Sess. Law Serv. 3888, 3924 (Vernon).

developed in an investigation under this chapter or in providing services as a result of an investigation.

We believe envelope three consists of reports, records, and working papers used or developed in investigations made under chapter 261 of the Family Code. We note that the documents indicate that two of the complaints were referred to the Texas Department of Health ("TDH"). Those complaints may be disclosed pursuant to TDH rules. Evidently, no referrals were made in the other two complaints. Thus, these may be disclosed pursuant to TMHMR rules.³

Envelope four contains two types of documents. The first type consists of reports of alleged abuse or neglect of the elderly which you say are protected from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 48.083 of the Human Resources Code. The second type consists of correspondence concerning individuals who received psychiatric treatment, which you assert is excepted from required public disclosure under section 552.101 of the Government Code as private information.

Former section 48.083 of the Human Resource Code related to the confidentiality of records. The Seventy-fourth Legislature amended that provision and added section 48.101. Section 48.101, which generally makes confidential records of investigations of abuse made under chapter 48 of the Human Resource Code, provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

We believe the first type of information in envelope four consists of chapter 48 reports. Accordingly, that information is confidential under section 48.101(a) of the Human Resources Code and therefore excepted from public disclosure under section 552.101 of the Government Code. We also agree that information that identifies the name

³Having concluded that access to the envelope three documents must be in accordance with agency rule, we need not address your claim that common-law privacy protects from disclosure the identity of the patients on the complaint logs.

of a psychiatric patient is protected from disclosure based on the common-law right to privacy. *See* Open Records Decision No. 343 (1982).

Envelope five contains confidential medical records. *See* V.T.C.S. art. 4495b § 5.08. These records may be released only in accordance with the Medical Practice Act. *See* Open Records Decision Nos. 565 (1990), 546 (1990).

Envelope six contains a civil investigative demand ("CID") from the consumer protection division of the OAG. You do not seek to withhold this letter. Envelope six also contains several sample documents that you say were produced pursuant to CID and made confidential by section 17.61(f) of the Business and Commerce Code.

The envelope also contains information provided the OAG in response to an examination report question the consumer protection division asked pursuant to section 17.60 of the Business and Commerce Code. You say this request for the examination report was combined with the CID. You aver that because a certain answer provided in response to the section 17.60 examination report would reveal the contents of documents produced pursuant to civil investigative demand and made confidential pursuant to section 17.61(f), that answer is likewise covered by section 17.61(f). The particular answer is a list of the allied health professionals who perform independent contractor services in the psychiatric units of the hospital under investigation. You say the information on these lists is in contracts the consumer protection division obtained pursuant to CID.

Section 17.61 of the Business and Commerce Code authorizes the OAG's consumer protection division to serve on a person it believes may be in possession of documentary material relevant to an investigation of a possible violation of the Deceptive Trade Practices-Consumer Protection Act a CID requiring the person to produce the documentary material. Section 17.60 of the Business and Commerce Code authorizes the OAG's consumer protection division to require a person who the consumer protection division believes is engaged in, or about to engage in, a violation of the Deceptive Trade Practices-Consumer Protection Act to report in writing any facts and circumstances concerning the alleged violation and such information as the consumer protection division deems necessary. Section 17.61(f) of the Business and Commerce Code, which generally prohibits the disclosure of documentary material produced pursuant to a CID, provides in part as follows:

No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the consumer protection division without the consent of the person who produced the material.

We believe this provision requires the OAG to withhold from required public disclosure all documentary material the consumer protection division obtained pursuant to CID.⁴ Gov't Code § 552.101. However, we do not believe this provision can serve to protect information the division obtained pursuant to section 17.60 of the Business and Commerce Code, notwithstanding the fact that the information obtained pursuant to section 17.60 appears in a document the division obtained pursuant to CID. The legislature provided no protection from disclosure for information obtained under section 17.60. We assume that had the legislature intended section 17.60 information to be protected from required public disclosure it could have done so. We cannot read into section 17.61(f) a construction of that provision that is not reflected in the plain words of the statute. Accordingly, the OAG may not withhold from required public disclosure information obtained under section 17.60 of the Business and Commerce Code.

The seventh and final envelope contains legal memos exchanged between OAG attorneys or between an OAG attorney and an OAG law clerk, and e-mails between OAG attorneys regarding the Columbia hospital litigation. You assert that these documents are excepted from required public disclosure pursuant to section 552.107(1), 552.108, and 552.111 of the Government Code.

Section 552.107(1) states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct

This exception applies only to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990). We agree that portions of the documents in envelope seven contain privileged attorney-client communications. Consequently, the OAG may withhold such communications from required public disclosure pursuant to section 552.107(1). We have marked the documents accordingly.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception

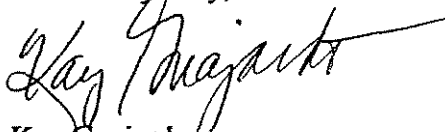
⁴Since you have not told us to the contrary, we assume the person who produced the information in response to the CID has not consented to the release of the information.

does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.*

We agree that section 552.111 applies to portions of the envelope seven information. We have marked that document accordingly.

Having concluded that you may withhold portions of the information in envelope seven pursuant to sections 552.107(1) and 552.111 of the Government Code, we need not address you section 552.108 claim at this time. We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/ch

Ref.: ID# 38226

Enclosures: Submitted documents

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